DISTRICT OF COLUMBIA
DOH OFFICE OF ADJUDICATION AND HEARINGS

DISTRICT OF COLUMBIA DEPARTMENT OF HEALTH Petitioner, v. VALIRA LIMITED PARTNERSHIP Respondent	Case Nos.: I-00-20388 I-00-20290

FINAL ORDER

I. Introduction

On February 1, 2002, the Government served a Notice of Infraction upon Respondent Valira Limited Partnership ("Valira"), alleging that it violated 21 DCMR 700.3 by failing to containerize solid wastes properly and 21 DCMR 707.9 by failing to store grease held for recycling or disposal in a tightly-sealed container. The Notice of Infraction alleged that the violations occurred on January 31, 2002 at 1825 M Street, N.W., and sought a fine of $1,000 for each violation.

Respondent did not file an answer to the Notice of Infraction within the required twenty days after service (fifteen days plus five additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e), 2-1802.05). Accordingly, on March 5, 2002 this administrative court issued an order finding Respondent in default and subject to the statutory penalty of $2,000 required by D.C. Official Code § 2-1801.04(a)(2)(A), and requiring the Government to serve a second Notice of Infraction. The Government served the second Notice of Infraction on March 11, 2002. On March 21, 2002, Respondent filed an answer with a plea of Deny.

I held a hearing on May 29, 2002. Ronnie Herrington, the inspector who issued the Notices of Infraction, appeared on behalf of the Government. Pam Finlay, a representative of Sign of the Whale Restaurant, a tenant in the premises at issue, appeared on behalf of Respondent.[1] At the hearing, Ms. Finlay moved to change Respondent's plea to Admit with Explanation, and I granted that motion.

Based upon the testimony of the witnesses, my evaluation of their credibility and the documents admitted into evidence, I now make the following findings of fact and conclusions of law.

II. Findings of Fact

Respondent Valira Limited Partnership owns a commercial building located at 1825 M Street, N.W. Sign of the Whale restaurant is a ground floor tenant at the building. Sign of the Whale has built a separate room in the back of the building in which to store its trash. The room was designed and constructed in an effort to prevent the entry of rodents. It has cinderblock walls, a concrete floor and a metal door that leads into an alley behind the premises. On January 31, 2002, the door was equipped with a padlock. At some time after January 31, a deadbolt lock

[1] Ms. Finlay filed the plea on behalf of Respondent and appeared on its behalf at the hearing. Based upon her testimony, Respondent's non-appearance at the hearing and its likely transmittal of the Notices of Infraction to Ms. Finlay, I find by the preponderance of the evidence that Respondent consented to this arrangement and I conclude that Ms. Finlay had actual or apparent authority to act for Respondent. *See DOH v. Bloch & Guggenheimer, Inc.* OAH No. I-00-10439 at 1, n.1 (Final Order, April 18, 2001). In the particular circumstances of this case, which include privity between Respondent, as landlord, and Ms. Finlay's employer, as tenant, I allowed Ms. Finlay to act for Respondent in this matter. See *Carr v. Evans Rose,* 701 A.2d 1065, 1075 (D.C. 1997) ("Traditional categories of privies include 'those who control an action although not parties to it [and] those whose interests are represented by a party to an action . . . .' ") (quoting *Lawlor v. National Screen Service,* 349 U.S. 322, 329 n.19, (1955). *Cf. United States v. ITT Rayonier, Inc.*, 627 F.2d 996, 1003 (9th Cir. 1980) (discussing doctrine of "virtual representation"*); Johnson v. Nationwide Business Forms, Inc.*, 103 Ill App. 631, 634, 431 N.E.2d 1096, 1098 (1st Dist. 1981) (same).

was installed on the door in order to improve security. Employees can exit from the restaurant into the alley through a rear door and then can enter the trash room from the alley. The restaurant has arranged for daily trash pickup from the trash room.

On January 31, 2002, Mr. Herrington inspected the alley. The door to the trash room was open, and he observed trash piled on one side of the trash room, including cardboard boxes and some food wastes. He also observed water on the floor in that area. On the other side of the room, he observed an uncovered drum. Respondent's plea of Admit with Explanation establishes that the drum contained grease that was being held for disposal or recycling.

It is often difficult for the trash collection company serving Sign of the Whale to drive its truck through the alley to get to the trash room, because other businesses block the alley by placing large trash containers in the alley to be picked up.[2] When this occurs, the trash collectors check the trash room to see if the amount of trash there is small enough to be carried to the truck at the end of the alley. If it is not, they leave the alley to service other customers and return later in the day to get the trash from the trash room. Jesse Richardson, a representative of the trash collection company, testified that the trash collectors may have forgotten to lock the door on January 31 after looking in the trash room and deciding to come back later to get the trash. Because Mr. Richardson was not present in the alley on January 31, and had no other source of information about what actually *did* happen, as opposed to what *may* have happened, I can make no specific finding about the reason why the door was open on January 31. The restaurant and/or the trash collection company were negligent, at the very least, in allowing the door to remain open, as this negated the value of the trash room as a rodent-proof area for the storage of trash.

[2] Other trash collection companies serve those businesses.

In addition to building the trash room, Sign of the Whale has taken other steps to prevent rodent infestation in the neighborhood. Both the Golden Triangle Business Improvement District and the owner of a neighboring business submitted letters stating that Ms. Finlay keeps the area outside the restaurant clean, that she has worked with neighboring businesses to keep the alley clean, and that she has removed trash left behind in the alley by other businesses when those establishments ceased operations. I find those statements to be credible.

Sign of the Whale now requires both its day manager and its night manager to check the trash room regularly to see that it is locked. There is also no evidence in the record that either Sign of the Whale or Valira has a history of prior violations.

The first Notice of Infraction was sent to Steve Raptakis, who formerly was the registered agent for Valira. As of July 2001, however, Kathie L. Dematatis became Valira's registered agent, and filed the appropriate notifications to effectuate the change. Mr. Raptakis did not forward the first Notice of Infraction to Valira or to Ms. Dematatis. He did, however, forward the Order of March 5 to Ms. Dematatis, who received it on March 14. Ms. Finlay's plea was received in the Clerk's Office six days later.

III. Conclusions of Law

Respondent's plea of Admit with Explanation establishes that it violated 21 DCMR 700.3 and 21 DCMR 707.9 on January 31, 2002. The Rodent Control Act of 2000 classified a violation of § 700.3 as a Class 1 infraction, which is punishable by a fine of $1,000 for a first offense.[3] 16 DCMR 3201. The Rodent Control Act also enacted § 707.9, *see* 47 D.C. Reg. at

[3] The Rodent Control Act of 2000 is Title IX of the Fiscal Year 2001 Budget Support Act of 2000, effective October 19, 2000, D.C. Law 13-172. See 47 D.C. Reg. 8962 (November 10, 2000); 47

6340, and a violation of that section also is punishable by a fine of $1,000 for a first offense. 16 DCMR 3216.1(g).

There is substantial evidence in the record that can serve to mitigate the fines, but that evidence focuses upon the activities of Sign of the Whale, not the activities of Valira, the Respondent in this case. Valira is the Respondent because, as owner of the property, it is strictly liable under § 700.3 for trash at its property, *Bruno v. District of Columbia Board of Appeals and Review*, 665 A.2d 202 ((D. C. 1995), and it arguably is strictly liable for the storage of grease at the property pursuant to § 707.9.[4] Because Valira is being held liable for the acts or omissions of its tenant, however, it is fair to allow it to take advantage of the tenant's actions that can mitigate the fine, particularly in the absence of any objection from the Government.

The evidence establishes that Sign of the Whale undertook extensive good faith efforts to comply with the regulations by constructing and maintaining a trash room designed to prevent rodents from gaining access to its trash. Sign of the Whale also instituted prompt corrective measures after the violations occurred by improving the lock on the door and requiring its managers to check the trash room regularly to see that it is locked. Sign of the Whale has accepted responsibility for the violations and there is no evidence that either it or Valira has a history of prior violations. This evidence is not sufficient to warrant suspension of the fines, however. The violations occurred because the door to the trash room negligently was left unlocked. Imposition of a fine is necessary to provide an incentive to avoid such negligence in

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D.C. Reg. 6308 (August 11, 2000). Section 910(b) of that Act established new fines for violations of various rodent control measures, including § 700.3. 47 D.C. Reg. at 6339 (August 11, 2000).

[4] Respondent's plea of Admit with Explanation makes it unnecessary to decide whether § 707.9 imposes strict liability upon a property owner.

the future. In light of the substantial mitigating evidence, the fine for each violation will be reduced to $175, for a total fine of $350.

The Civil Infractions Act, D.C. Code Official Code §§ 2-1802.02(f) and 2-1802.05, requires the recipient of a Notice of Infraction to demonstrate "good cause" for failing to answer it within twenty days of the date of service by mail. If a party does not make such a showing, the statute requires that a penalty equal to the amount of the proposed fine must be imposed. D.C. Official Code §§ 2-1801.04(a)(2)(A) and 2-1802.02(f). Because the first Notice of Infraction was sent to Valira's former registered agent, instead of its current one, because the former agent did not forward it promptly, and because Respondent filed an answer promptly upon receiving the March 5 Order, Respondent has established good cause for its failure to file an answer within the statutory deadline. Accordingly, I will not impose the statutory penalty.

IV. Order

Based upon the foregoing findings of fact and conclusions of law, it is, this _____ day of _____, 2002:

ORDERED, that Respondent shall pay a total of **THREE HUNDRED FIFTY DOLLARS ($350)** in accordance with the attached instructions within twenty (20) calendar days of the mailing date of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

ORDERED, that if Respondent fails to pay the above amount in full within twenty (20) calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at

the rate of 1½ % per month or portion thereof, starting from the date of this Order, pursuant to D.C. Code Official Code § 2-1802.03 (i)(1); and it is further

ORDERED, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent's licenses or permits pursuant to D.C. Official Code § 2-1802.03(f), the placement of a lien on real and personal property owned by Respondent pursuant to D.C. Official Code § 2-1802.03(i) and the sealing of Respondent's business premises or work sites pursuant to D.C. Official Code § 2-1801.03(b)(7).

FILED 06/12/02

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John P. Dean
Administrative Judge